The right of communication to the public: a critical analysis in eight steps

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A quick and confusing succession of judgments

- Svensson (C-466/12, 2014)
- BestWater (C-348/13, 2014)
- GS Media (C-160/15, 2016)
- Filmspeler (C-527/15, 2017)
- OSA v Léčebné lázně (C-351/12, 2014)
- C-More Entertainment (C-279/13, 2015)
- Soc. Portugesa de Autores (C-151/15, 2015)
- SBS Belgium (C-325/14, 2015)
- RehaTraining (C-117/15, 2016)
- AKM v Zürs.net (C-138/16, 2017)
- Ziggo [Pirate Bay] (C-610/15, 14/06/2017)

More to come, eg BGH, ref of 23/02/2017 – Córdoba

today
8 theses /propositions

The present state (1-5)
- CJEU approach in general (1-3)
- Primary/secondary liability (4)
- Judicial law-making (5)

Reform (6-8)
- Art 13 draft DSM Dir (6)
- A three-layer approach (7)
- Liability of intermediaries (8)
1. The CJEU’s approach to communication to the public hovers between a formalist approach and a more substantive, multi-factor test.
1. Between formalism and a multi-factor test

**Formalism (eg Svensson, OSA)**

1. Communication (to be construed broadly) = affording users access to the work
2. To the public
   a. indeterminate, fairly large number of people
   b. New public or new technical means

**Multi-factor test (eg Del Corso, GS Media)**

- Essential role of the user
- Flexible “tool-box” of substantive criteria, such as
  - intention to make a profit / of offering a service in order to receive a benefit
  - receptiveness of user
  - subjective factors, esp. full knowledge of consequences of own act (including knowledge of the law?)
  - duties of care
2. The formalist approach may lead to inadequate consequences. It is the result of premature generalisation from specific rationes decidendi.
The formalist test seems clear and easy, but...

- ... the broad concept of communication blurs the line between primary and secondary liability
  - link does not make available, but only facilitates discovery (AG Wathelet in GS Media)
  - “affording users access” without regard to intervening actions by others includes liability of intermediaries
- ... “new public” can be one factor, but it is not always the crucial one
  - When the work is made available to a new public, the right owner should normally participate (example: the TV set in the bar, see WIPO Guide to BC)
  - But the reverse is not true, as the making available right is not subject to exhaustion (and shouldn’t be)
  - Example: BGH GRUR 2017, 514 – Córdoba (W v Nordrhein-Westfalen, reference to CJEU of 23/02/2017)
The dilemma in *GS Media*: “new public” in case of link to work posted w/o right owner’s consent?

**No (AG Wathelet) → no liability even in case of intention → “exhaustion” even without the right owner’s consent**

**Yes (BGH GRUR 2016, 171 – *Die Realität II* = follow-up to *BestWater*) → strict liability even for private linking → severe interference with freedom of internet**
2. The formalist approach

Svensson: a methodological critique

CJEU – SGAE v Rafael Hoteles

Distinguishing or application by analogy?

CJEU – Svensson
3. The multi-factor test allows for adequate solutions, but it may result in legal uncertainty and ad-hoc law-making. In this scenario, bad cases make particularly bad law.
GS Media: a polemical critique (1)

- The GS Media rule:
  - Link not posted for profit → liability in case of actual or constructive knowledge
  - Link posted for profit → knowledge presumed, presumption can be rebutted by showing that “necessary checks” have been made

- R & A Rules of Golf, Rule 1-4: “If any point in dispute is not covered by the Rules, the decision should be made in accordance with equity.”

- Uncertainty, because:
  - Nobody could have expected this.
  - How to distinguish non-profit and for-profit linking?
  - What are the “necessary checks”? Do they only relate to licences or also to other legal issues (e.g., application of exceptions)?
3. The multi-factor test

GS Media: a polemical critique (2)

- The GS Media rule leads to a fair result for non-profit links → notice and take down as the basic principle of intermediary liability
- But it goes much too far for links on commercial websites
  - No factual basis for presumption of knowledge
  - Imagine the application to a search engine! See also AG Szpunar in Pirate Bay
- Could be the starting-point for a duty of care approach (see presentation Professor Nordemann), but the onus should be on the claimant
- Bad cases make bad law!
4. Due to the broad interpretation of the term “communication” the line between primary and secondary liability has become blurred. This approach may lead to inconsistencies with other intellectual property rights, with Art 8 (3) InfoSocDir and with national doctrines of secondary liability.
4. Primary and secondary liability

Primary infringement (e.g., upload)

- Primary infringer
- Intermediary
- Providing means to infringe

Right owner

National doctrines of intermediary liability (e.g., inducement/authorisation or Störerhaftung)
But this distinction has become blurred:

- No distinction between primary and secondary liability in cases of linking and framing (*Svensson, GS Media*), contrary to earlier national cases (BGH GRUR 2003, 958 – *Paperboy*)
- Making content “one’s own” (“Zueigenmachen”) is probably not a relevant factor (*BestWater*), contrary to German practice (BGH GRUR 2014, 706 – marions-kochbuch.de)
- Providing a device which enables infringement and pointing out this possibility in advertising is a primary infringement (*Filmspeler*), contrary to most national laws (House of Lords, *CBS v Amstrad*, [1988] AC 1013, US Supreme Court, *MGM Studios v Grokster*, 545 US 913) and in tension with recital 27 InfoSoc Dir
- Platform operators may be liable for primary infringement (recital (38) draft DSM directive, AG Szpunar in *Ziggo [TPB]*), contrary to cases like *Grokster* and German case-law in YouTube cases
A methodological critique

• The CJEU does not discuss the point openly (but see AG Szpunar in Ziggo), although this is a fundamental doctrinal and policy issue.

• Nor does the court take note of the prior national experience.
  – Not all of it may be sound (I personally do not like the German rule in marions-kochbuch.de).
  – But it should be persuasive authority: Discuss it and reject it if you have better arguments!
Why distinguish?

- A primary infringer who uses the work herself / himself is liable whenever (s)he does one of the acts exclusively allocated to the right owner.
- Whereas secondary liability requires additional criteria of imputation.
  - Example 1: mainly subjective criteria under common law doctrines of inducement / authorisation in *Grokster* and in *CBS v Amstrad* (see P Davis, *Accessory Liability*)
  - Example 2: duties of care under the German doctrine of Störerhaftung (interferer’s liability)
  - *GS Media* mentions some of these criteria, but the distinction from primary liability is lacking
- Secondary liability is closely connected to national tort law doctrine.
  - Subjective elements of liability for incitement and assistance
  - Duty of care concepts
And in Europe?

Art 3 InfoSoc

Art 8 (3) InfoSoc

Secondary liability

or

Art 3 InfoSoc

Art 8 (3) InfoSoc
4. Primary and secondary liability

An autonomous, judge-made concept of secondary liability?

- Opinion AG Szpunar in C-610/15, Ziggo/Pirate Bay at para 3:

  “The European Commission, whose opinion appears to me to be shared by the United Kingdom of Great Britain and Northern Ireland, contends that liability for sites of this type is a matter of copyright application, which can be resolved not at the level of EU law but under the domestic legal systems of the Member States. Such an approach would, however, mean that liability, and ultimately the scope of the copyright holders’ rights, would depend on the very divergent solutions adopted under the different national legal systems. That would undermine the objective of EU legislation in the relatively abundant field of copyright, which is precisely to harmonise the scope of the rights enjoyed by authors and other rightholders within the single market. That is why the answer to the problems raised in the present case must, in my view, be sought rather in EU law.”
An autonomous, judge-made concept of secondary liability?

- Opinion AG Szpunar in C-610/15, *Ziggo/Pirate Bay* at para 3: autonomous concept
- Objection 1: Recital 59 (5) InfoSoc Dir leaves the conditions and modalities for injunctions against intermediaries to the Member States
- Objection 2: risk of conflicts with national / European tort law doctrines
- Objection 3: the CJEU distinguishes between “own use” and the liability of intermediaries in trade mark law (*C-236 – C-238/08, Google France*, *C-324/09, L’Oréal v eBay*)
- Objection 4: criteria of imputation (objective duty of care? Subjective criteria such as knowledge) should be discussed openly
5. In the area of economic rights, the law is no longer made in Brussels, but in Luxemburg. But the preliminary reference procedure is not a good basis for judicial law-making.
Judicial law-making and its drawbacks

• Recent directives have left the central issues of © law untouched.

• Contours of economic rights and distinction primary/secondary liability have exclusively been dealt with by the CJEU.

• Problems of the preliminary reference procedure:
  – selection of cases and presentation of facts by national courts
  – in particular lack facts clarifying the economic background
  – restriction to abstract questions of law
  – superficial way of dealing with precedent
  – national experiences only taken into account haphazardly
6. Legislation should reclaim the lead. Article 13 of the draft DSM Directive is a rather weak attempt at doing so.
Art 13 (1) Draft Directive on Copyright in the Digital Single Market

Information society service providers that store and provide to the public access to large amounts of works or other subject-matter uploaded by their users shall, in cooperation with rightholders, take measures to ensure the functioning of agreements concluded with rightholders for the use of their works or other subject-matter or to prevent the availability on their services of works or other subject-matter identified by rightholders through the cooperation with the service providers. Those measures, such as the use of effective content recognition technologies, shall be appropriate and proportionate.(...
Art 13 draft DSM Directive: a (very brief) critical appraisal

- Assumes that ISPs regularly performing acts of communication to the public (recital 38) without modifying Art 3 InfoSoc Dir
- Requirement 1: ISPs should take measures to ensure the functioning of agreements → no incentive to reach these agreements in the first place, enforcement of agreements is probably a contractual duty anyway
- Requirement 2: ISPs should prevent availability of works identified by right-holders → if infringing, this duty exists under Arts 3; 8 (3) InfoSc Dir anyway
- Directive (almost) does not affect other directives, in particular InfoSoc → But this would be essential for a coherent legal regime
7. The way forward could be a three-layer approach, consisting of a “black list” of clear infringement cases, more general categories of market-sensitive provisions and a general clause of communication to the public.
7. A three-layer approach

Layer 1
- A Black List of core infringements
- Eg making available a work online by uploading in the course of trade

Layer 2
- Flexible provisions with market effect clauses
- Eg integrating a work into one’s own website by means of framing, provided it has a negative effect or results in an undue advantage

Layer 3
- A general clause
- The present Art 3 plus elements 2 and 3 of the three-step test
8. It should be accompanied by a clear distinction between primary liability (liability for own uses of protected subject-matter), secondary liability (liability for a violation of duties of care in cases of indirect infringement) and a duty for innocent parties to assist in order to stop infringement.
8. Primary and secondary liability

3 types of responsibility

Primary liability
liability for own use of work = liability for performing the acts allocated to the right owner (e.g., upload) → full liability

Secondary liability
liability for enabling others to infringe → should require the violation of a duty of care which may vary depending on typical situations and individual circumstances → injunctions, restricted liability for damages

Duty to assist
Even without violation of duty: accountable, not liable (Husovec) = the present Art 8 (3) → duty to take down, but cost of measure should regularly be paid by right owner
This is a Herculean task. Scratching the surface is not enough. But EU legislation should muster the power to tackle it.

Photo: Marie-Lan Nguyen, Wikimedia commons
Merci beaucoup de votre attention!
Hartelijk danken voor uw andacht!